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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

DOUGLAS A. AMES,

Plaintiff and Appellant,

v.

J. CHARLES SHEAK et al.,

Defendants and Respondents.

E029867

(Super.Ct.No. 809816)

O P I N I O N

APPEAL from the Superior Court of Orange County. Richard M. Aronson, Judge.

Affirmed.

Law Offices of Douglas A. Ames and Douglas A. Ames, in pro. per., for Plaintiff and Appellant.

Law Offices of Berry & Ross, Victoria A. Berry, James Ross and Lewis J. Ross for Defendants and Respondents.

Plaintiff and appellant Douglas A. Ames appeals after the Superior Court of Orange County dismissed his malicious prosecution action against defendants and respondents, J. Charles Sheak, Sheak & Korzun (a law firm), David Wintermute, and Vollers Excavating and

Construction, Inc. (Vollers Construction). The court determined that it had no personal jurisdiction over the defendants, and quashed the service of summons upon them. Plaintiff now appeals, contending that the court erred in ruling that it did not have jurisdiction over the defendants. The contention is without merit. We shall affirm.

FACTS AND PROCEDURAL HISTORY

The defendants in the present action, Vollers Construction, its principal, David Wintermute, and its legal representatives, the law firm of Sheak & Korzum and attorney J. Charles Sheak, were the plaintiffs in an action filed in the state of New Jersey. The New Jersey action named as a defendant Transphase Systems, Inc. (Transphase). Plaintiff Ames was a minority shareholder of Transphase. The New Jersey complaint was eventually amended to name plaintiff Ames personally as a defendant in that action. The New Jersey complaint, in various amended versions, assertedly alleged that plaintiff Ames had committed fraudulent and criminal acts. Plaintiff Ames defended himself in the New Jersey action, and had it removed to the United States District Court for the District of New Jersey. Ultimately, plaintiff Ames succeeded in having the New Jersey action dismissed as against himself personally.

Plaintiff Ames then filed the instant action for malicious prosecution, naming Vollers Construction, Wintermute, Sheak & Korzum, and attorney Sheak as defendants. Defendants removed the action to the United States District Court for the Central District of California, and sought consolidation with what remained of the United States District Court action against Transphase, in New Jersey. Plaintiff Ames then sought remand of his

malicious prosecution action back to the California state court. That motion was granted on July 8, 1999. Defendants then moved to quash the service of summons upon them.

The sole allegations of the malicious prosecution complaint which showed that defendants had any contact with California was that defendants had caused pleadings in the New Jersey action to be mailed to plaintiff Ames in California. The Orange County Superior Court concluded that the defendants had insufficient contacts with California to justify asserting personal jurisdiction over them in the malicious prosecution action. The court accordingly granted the defendants' motions to quash the service of summons, and dismissed plaintiff Ames's action against them.

Plaintiff now appeals.

ANALYSIS

I. Defendants Had Insufficient "Minimum Contacts" in California to Assert Personal Jurisdiction Over Them

A. Principles of Jurisdiction

California's long-arm statute authorizes California courts to exercise jurisdiction on any basis not inconsistent with the Constitution of the United States or the Constitution of California.¹ The Due Process Clause of the United States Constitution permits a state to assert jurisdiction over a person, who has not been found or served within the forum state, "if the defendant has such minimum contacts with the state that the assertion of jurisdiction

¹ Code of Civil Procedure section 410.10.

does not violate “traditional notions of fair play and substantial justice.” (*International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316 [90 L.Ed. 95, 102, 66 S.Ct. 154, 161 A.L.R. 1057])”²

“Personal jurisdiction may be either general or specific. A nonresident defendant may be subject to the *general* jurisdiction of the forum if his or her contacts in the forum state are ‘substantial . . . continuous and systematic.’ [Citations.] In such a case, ‘it is not necessary that the specific cause of action alleged be connected with the defendant’s business relationship to the forum.’ [Citations.] Such a defendant’s contacts with the forum are so wide-ranging that they take the place of physical presence in the forum as a basis for jurisdiction. [Citation.]”³

“If the nonresident defendant does not have substantial and systematic contacts in the forum sufficient to establish general jurisdiction,” however, “he or she still may be subject to the *specific* jurisdiction of the forum, if the defendant has purposefully availed himself or herself of forum benefits [citation], and the ‘controversy is related to or “arises out of” a defendant’s contacts with the forum.’”⁴ “[S]pecific jurisdiction is determined under a three-part test: ‘(1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails

² *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444-445.

³ *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th 434, 445-446, original italics.

⁴ *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th 434, 446, original italics.

himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable.”⁵

B. Standard of Review

“‘When a nonresident defendant challenges personal jurisdiction the burden shifts to the plaintiff to demonstrate by a preponderance of the evidence that all necessary jurisdictional criteria are met. [Citation.] This burden must be met by competent evidence in affidavits and authenticated documentary evidence. An unverified complaint may not be considered as an affidavit supplying necessary facts.’ [Citation.] . . . Once facts showing minimum contacts with the forum state are established, . . . it becomes the defendant's burden to demonstrate that the exercise of jurisdiction would be unreasonable. [Citation.] Where there is no conflict in the evidence, the question of personal jurisdiction is one of law; in such a case, the lower court's determination is not binding on the reviewing court. [Citation.]”⁶

⁵ *Jewish Defense Organization, Inc. v. [Superior Court]* (1999) 72 Cal.App.4th 1045, 1054.

⁶ *Jewish Defense Organization, Inc. v. Superior Court, supra*, 72 Cal.App.4th 1045, 1054-1055.

Here, the evidence concerning jurisdictional contacts is essentially undisputed. The question of personal jurisdiction is, therefore, one of law which we determine independently.⁷

C. Specific Jurisdiction Was Not Established Over Defendants

1. It Is Questionable Whether Any “Act” or “Transaction” Was Done or Consummated Within the State

With respect to the first prong of the three-part test for specific jurisdiction, the sole “act” or “transaction” plaintiff Ames identifies which had anything to do with California was the conduct (in New Jersey) of mailing New Jersey action pleadings to plaintiff Ames. Plaintiff Ames received these documents in California.

We do not believe the act of mailing in New Jersey constituted an “act” or “transaction” in California. For example, in *Inselberg v. Inselberg*,⁸ the court rejected the notion that telephone calls from the defendants in Michigan to the plaintiff in California met the requirements of the effects test: either (1) that the effects in the forum state were of such a nature that the state treats them as exceptional and subject to special regulation, or (2) that the defendant, in causing effects in the forum state, had invoked the benefits and protections of the forum state’s laws.⁹ A fortiori, the act of mailing a document in New

⁷ *Hall v. LaRonde* (1997) 56 Cal.App.4th 1342, 1346.

⁸ *Inselberg v. Inselberg* (1976) 56 Cal.App.3d 484, 491.

⁹ *Quattrone v. Superior Court* (1975) 44 Cal.App.3d 296, 306.

Jersey, which was received in California, did not constitute an “act” undertaken in California.

2. No “Purposeful Availment” of Conducting Activities in the Forum State

Even if we assume that the acts of mailing pleadings and other litigation documents to plaintiff Ames in California constituted some kind of “act” or “transaction” in California, plaintiff Ames has not shown, and cannot show, that the acts of mailing pleadings and briefs to him in California represented defendants’ “purposeful availment” of some privilege to conduct business in the forum state. Defendants had no control over where plaintiff Ames lived. They were required to mail relevant pleadings to him, a party to the New Jersey action, in California. They did not “purposefully avail” themselves of any privilege to conduct any business in California. They could hardly have done otherwise than to send litigation-related documents to plaintiff Ames at his California mailing address.

3. No Invocation of California Benefits and Protections

Plaintiff Ames identifies no manner in which defendants’ acts of mailing pleadings to him in California constituted their invocation of any benefit or protection of *California’s* laws.

4. The Claim Does Not Arise Out of Defendants’ Forum-Related Activities

Plaintiff Ames also fails to present any evidence to support the second prong of the test for special jurisdiction. The defendants’ conduct, of making allegations concerning plaintiff Ames in their New Jersey pleadings, constituted New Jersey acts, not California acts. Plaintiff Ames’s claim arises out of the nature of the allegations in the New Jersey action, and not out of the fortuitous circumstance that he received pleadings in California.

As in *Hill v. Noble Drilling Corp.*,¹⁰ the brute fact of plaintiff Ames's California residence did not mean that the alleged tortious conduct (conducting the New Jersey litigation against him without probable cause) had an "effect" in California. Likewise, the mere foreseeability that defamatory statements might be published in California "alone is not enough to subject [the defendants] to personal jurisdiction in this state."¹¹

5. Assertion of Jurisdiction Is Not Reasonable

Finally, assertion of jurisdiction over the defendants here would not meet the test of reasonableness, the third prong of the special jurisdiction test. Defendants did nothing to deliberately avail themselves of any particular contact with California. As noted, they had no control over where plaintiff Ames lived. They were obligated to send New Jersey pleadings to plaintiff Ames in California, but they did nothing voluntarily to invoke any privileges, rights, benefits, or protections of any California law. Their contact was too attenuated to render reasonable the assertion of personal jurisdiction over them in California.

On the undisputed facts, special jurisdiction over these defendants cannot be justified.

II. Defendants Did Not Waive the Right to Assert Lack of Jurisdiction

Plaintiff Ames next contends that defendants waived the right to quash the service of summons by answering the complaint, once it had been removed to federal court. That is,

¹⁰ *Hill v. Noble Drilling Corp.* (1976) 61 Cal.App.3d 258, 263.

plaintiff argues that, because defendants filed an answer in the federal court, and the federal court action was later remanded to the state court, the defendants' federal court answer constituted a general appearance in the state law action, and that therefore defendants have waived any jurisdictional claims under Code of Civil Procedure section 418.10.

We reject the argument.

When defendants requested removal to federal court, that act did not constitute a general appearance for purposes of personal jurisdiction.¹² Upon removal, federal law governs.¹³ As plaintiff Ames admits, defendants' answer in federal court, raising the jurisdictional defense, was the proper method of preserving the issue under federal procedural law. Plaintiff Ames apparently takes the view that state procedural law should apply to defendants' actions in the federal court, and that their federal court answer should therefore constitute a general appearance in the action for state court purposes, once the matter was remanded to the state court.

As defendants point out, plaintiff Ames has not cited, and we have not found, any authority to support the contention that filing a pleading in the federal court—a wholly

[footnote continued from previous page]

¹¹ *Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1759.

¹² *Nationwide Engineering & Control Systems v. Thomas* (8th Cir. 1988) 837 F.2d 345, 347-348 ("Removal, in itself, does not constitute a waiver of any right to object to lack of personal jurisdiction, 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1395 (1969)").

¹³ *Granny Goose Foods v. Teamsters* (1974) 415 U.S. 423, 436 [94 S.Ct. 1113, 39 L. Ed. 2d 435].

distinct and separate tribunal—pursuant to its rules, effects a waiver of all objections to state court jurisdiction. It is a matter of textbook law that, while a diversity case resides in the federal court, the federal court applies state substantive law, and federal procedural law.¹⁴

Defendants proceeded properly under federal procedural law to preserve their objections to jurisdiction. We will not now countenance a change of rules to penalize them under state procedural law for their proper acts under federal procedural law. We conclude that defendants' actions in the federal court did not constitute a waiver for purposes of state procedural law of their jurisdictional challenge.

DISPOSITION

The order dismissing plaintiff Ames's complaint is affirmed.

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/s/ Ward
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Gaut
J.

¹⁴ See *Hanna v. Plumer* (1965) 380 U.S. 460, 471 [85 S.Ct. 1136, 14 L.Ed.2d 8, 16-17].